

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 121.

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FREDERICK HOWARD, JAMES L. LOMBARD, AND JOHN  
C. GAGE, PLAINTIFFS IN ERROR,

*vs.*

THE UNITED STATES TO THE USE OF DAVID D.  
STEWART.

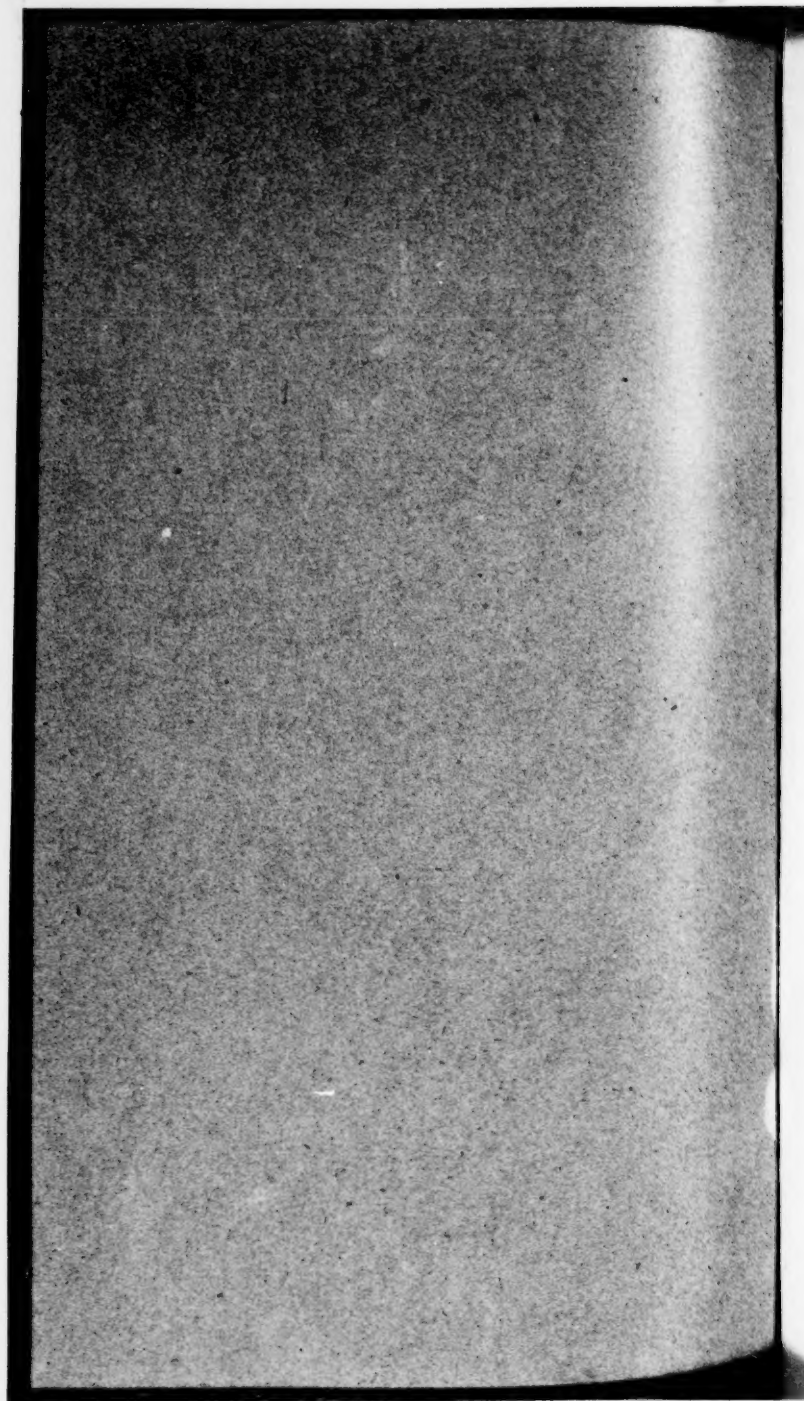
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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.

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FILED JULY 31, 1900.

(17,851.)



16434

(17,851.)

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*a* Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1899, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the fourth day of December, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,  
*Clerk of the United States Circuit Court of Appeals  
for the Eighth Circuit.*

Be it remembered that heretofore, to wit, on the eighth day of July, A. D. 1899, a transcript of record, in pursuance of a writ of error directed to the circuit court of the United States for the western district of Missouri, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case wherein Frederick Howard and others were plaintiffs in error and The United States to the use of David D. Stewart and Witten McDonald were defendants in error; which said transcript of record is in the words and figures following:

1 UNITED STATES OF AMERICA, *set*:

To the United States to the use of David D. Stewart and Witten McDonald, Greeting.

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein Frederick Howard, James L. Lombard and John C. Gage are plaintiffs in error, and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the circuit court of the United States for the eighth circuit, this 3rd day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

AMOS M. THAYER,  
*Circuit Judge.*

UNITED STATES OF AMERICA, }  
*Western Division of the Western District of Missouri,* } ss:

We hereby acknowledge due service of the within citation this sixth day of June, A. D. 1899.

J. V. C. KARNES,  
ALEXANDER NEW,  
EDWIN A. KRAUTHOFF,  
DAN'L B. HOLMES,  
*Attorneys for Defendants in Error.*

2058. United States circuit court, western district of Missouri, western division. United States to the use of David D. Stewart *vs.* Frederick Howard, James L. Lombard, John C. Gage. Citation. Filed June 6, 1899. Adelaide Utter, clerk.

UNITED STATES OF AMERICA, *set* :

The President of the United States of America to the honorable judges of the circuit court of the United States for the western division of the western district of Missouri, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the April term, 1899, thereof, between The United States to the use of David D. Stewart, as plaintiff, and Frederick Howard, James L. Lombard, John C. Gage and Witten McDonald, as defendants, a manifest error hath happened, to the great damage of the said defendants Howard, Lombard and Gage as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 20th day of July, 1898, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court. Issued at office in Kansas City, this 3rd day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

ADELAIDE UTTER, *Clerk.*

Seal of the United States Circuit Court for the Western District of Missouri, Western Division.

Allowed this June 3rd, 1899.

AMOS M. THAYER,  
*Circuit Judge.*

UNITED STATES OF AMERICA,  
*Western Division of the Western District of Missouri,* } *set* :

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal

Seal of the United States Circuit Court for the Western District of Missouri, Western Division.

of said circuit court of the United States for the western division of the western district of Missouri. Issued at office in Kansas City, this twenty-eighth day of June, A. D. 1899.

ADELAIDE UTTER, *Clerk*.

3      2058. United States circuit court, western district of Missouri, western division. United States to the use of David D. Stewart *vs.* Frederick Howard, James C. Lombard, John C. Gage. Writ of error. Filed June 6, 1899. Adelaide Utter, clerk.

UNITED STATES OF AMERICA, *set* :

Be it remembered that heretofore, to wit, on the 19th day of October, A. D. 1895, there was filed in the office of the clerk of the circuit court of the United States, for the western division of the western district of Missouri, a petition in a cause wherein The United States of America, to the use of David D. Stewart, is plaintiff, and Frederick Howard and others are defendants.

Said petition is in words and figures as follows :

In the Circuit Court of the United States within and for the Western Division of the Western District of the State of Missouri.

UNITED STATES OF AMERICA at the Relation of and to the Use of  
David D. Stewart, Plaintiff,

*vs.*

FREDERICK HOWARD, JOHN CUTTER GAGE, JAMES LEWIS LOMBARD, and Witten McDonald, Defendants.

Plaintiff says that David D. Stewart is, and was at all the times hereinafter mentioned, a citizen and resident of the State of Maine, and the defendants and each of them are now, and at all the times hereinafter mentioned, were citizens and residents of the State of Missouri, and inhabitants of the western division of the western district thereof, and that the amount herein involved, exclusive of interest and costs, exceeds two thousand dollars.

Plaintiff further says that on March 3rd, 1887, one Warren Watson, and the defendants herein named, executed their writing obligatory, in which they acknowledged themselves to be held and firmly bound unto the United States of America, in the sum of twenty thousand dollars, lawful money of the United States, the condition of said obligation being that whereas the said Warren Watson had, pursuant to law, been appointed to be clerk of the circuit court of the United States, for the western division of the western district of Missouri; now if the said Warren Watson, by himself and by his deputies, should faithfully perform all the duties of the said office of the clerk, then said obligation to be void; otherwise to remain in full force and virtue. Plaintiff for a breach of said writing obligatory says that said Warren Watson did not faithfully perform all

4 the duties of said office of clerk in this, that on the — day of —, 1890, the relator herein, D. D. Stewart, instituted an action in this court against Henry County. Said action was brought for the recovery of \$2,500 and interest and costs. Thereafter, on the — day of March, 1891, said Henry County did deposit with said Warren Watson, as clerk of this court, under and pursuant to an order of said court to that effect, the sum of \$2,525. Thereafter, on the — day of February, 1895, said action wherein D. D. Stewart was plaintiff and Henry County was defendant, coming on for trial, this court did order and adjudge that said D. D. Stewart was entitled to recover of said Henry County the sum of \$2,525.00, and said court did further find that after the plaintiff, D. D. Stewart, had instituted said action, said Henry County had paid said sum of \$2,525 to the clerk of the court for the use and benefit of plaintiff, and it further appearing to the court that the said sum of \$2,525 so paid into court as aforesaid, was paid to and received by Warren Watson, the then clerk of this court, and that said Warren Watson had departed this life without having accounted for said sum of money so received by him as said clerk and that said (*said*) money had never been turned over to his successor in office the present clerk of this court, nor had the same been otherwise accounted for by said Warren Watson as clerk or otherwise, it was found and adjudged by the court that said plaintiff, D. D. Stewart, was entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff, D. D. Stewart, was authorized to proceed therewith on the bond of said Warren Watson, given as clerk as aforesaid.

Plaintiff further says that neither said sum of \$2,525 nor any part thereof, has ever been paid said David D. Stewart.

Wherefore, the United States of America at the relation of and to the use of David D. Stewart, prays judgment against the defendants, for said sum of \$2,525, together with interest and costs.

KARNES, HOLMES & KRAUTHOFF,

*Attorneys for Plaintiff.*

Thereupon, on the same day, to wit, on the 19th day of October, A. D. 1895, a writ of summons was issued in the above-entitled cause, which writ, with the return of the marshal endorsed thereon, was filed on the 22nd day of October, 1895.

Said writ of summons is in words and figures as follows:

5

UNITED STATES OF AMERICA, )  
*Western Division of the Western District of Missouri,* ) *et al :*

The President of the United States of America to the marshal of the United States for the western district of Missouri, Greeting:

You are hereby commanded to summon Frederick Howard, John Cutter Gage, James Lewis Lombard, and Witten McDonald, citizens of the State of Missouri and residents of the western division of the western district thereof to be and appear before the honorable circuit court of the United States, in and for the western division of

the western district of Missouri, on the first day of the next term thereof, to be begun and holden at Kansas City, in said district, on the first Monday, the 4th day of November next; then and there to answer to complaint of United States of America, at the relation of and to the use of David D. Stewart, a citizen and resident of the State of Maine, as set forth in the petition filed in the office of the clerk of said court, on the 19th day of October, A. D. one thousand eight hundred and ninety-five.

Hereof fail not and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 19th day of October, A. D. eighteen hundred and ninety-five. Issued at office in Kansas City, in said district, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.]

ADELAIDE UTTER, *Clerk.*

I hereby deputize C. W. Wenrich to execute this writ.  
October 19th, 1895.

JO. O. SHELBY,  
*U. S. Marshal.*

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *set :*

I do hereby certify that I served the within writ by delivering a true copy thereof together with a true copy of the petition in the cause to Jas. L. Lombard and by delivering a duly certified copy of this writ to Witten McDonald, and further executed said writ by delivering duly certified copies of the same to members of the families of Frederick Howard and Jno. Cutter Gage, over the ages of fifteen years and at their usual places of abode.

All done in the western division, western district of Missouri, on this 19th day of October, 1895.

JO. O. SHELBY,  
*United States Marshal,*  
By CHAS. W. WENRICH, *Deputy.*

6      Thereafter, to wit, on the 18th day of November, 1895, the following entry appears of record in the above-entitled case :

UNITED STATES <i>ex Rel.</i> STEWART	} 2058.
<i>against</i>	
FREDERICK HOWARD ET AL.	

This day come the defendants and file demurrer to the petition herein.

Thereafter, to wit, on the 22nd day of November, 1897, the following entry appears of record in the above-entitled case :

UNITED STATES *ex Rel.* — }  
*against* } 2058.  
 FREDERICK HOWARD ET AL.

Now on this day the demurrer to the petition being submitted to the court, is by the court overruled, to which action of the court the defendants except. Thereupon come the parties and file a stipulation waiving a jury herein, and it is ordered that defendant have three days within which to file answer.

Thereafter, to wit, on the 24th day of January, A. D. 1898, the following entry appears of record in the above-entitled case:

U. S. *ex Rel.* STEWART }  
*against* } 2058.  
 FREDERICK HOWARD ET AL.

This day come defendants by their attorneys and file answer.  
 Said answer is in words and figures as follows:

In the United States Circuit Court in and for the Western Division of the Western District of Missouri, at Kansas City.

UNITED STATES OF AMERICA at the Relation of and to the Use of David D. Stewart, Plaintiff,	} No. 2058. Answer.
18. FREDERICK HOWARD, JOHN CUTTER GAGE, James Lewis Lombard, and Witten Mc- Donald, Defendants.	

Now come defendants and for answer to the petition of plaintiff, aver:

1. They deny each and every allegation in the petition contained, except as herein expressly admitted.

Upon March 3rd, 1887, Warren Watson was appointed clerk of the circuit court of the United States for the western division of the western district of Missouri, and acted as such from that date until his death, which occurred on the — day of —, 1892.

7 Upon March 3rd, 1887, said Watson and these defendants executed the following instrument of writing:

Know all men by these presents: That we, Warren Watson, Frederick Howard, John Cutter Gage, James Lewis Lombard, Witten McDonald, of the city of Kansas, county of Jackson, State of Missouri, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the said United States, to be paid to the said United States; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Signed with our hands and sealed with our seals, this 3rd day of March, 1887.

The condition of the above obligation is such, — whereas, the said Warren Watson has, pursuant to law, been appointed to be clerk of the circuit court of the United States, for the western division of the western district of Missouri, as by order of appointment bearing date the 3rd day of March, 1887, and recorded on page 70 of Book Law "D" of the records of said court will more fully appear.

Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments and determinations of said court, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed)

WARREN WATSON.

{SEAL.}

(Signed)

FREDERICK HOWARD.

{SEAL.}

(Signed)

JOHN CUTTER GAGE.

{SEAL.}

(Signed)

JAMES LEWIS LOMBARD.

{SEAL.}

(Signed)

WITTEN McDONALD.

{SEAL.}

No other instrument or bond was ever executed by these defendants with the said Watson or on his behalf.

Wherefore, defendants ask to be dismissed with costs.

2. Warren Watson died upon the — day of —, 1892, while he was yet clerk of said court, as stated in paragraph 1 hereof. An administration was had upon his estate in the probate court of Jackson county, Missouri, having jurisdiction thereof. The notice required by statute for proving demands was given, but no demand has ever been made by D. D. Stewart, or any person on his behalf, or by the United States, or by any successor of said Watson, as clerk, for any money ever received by him, nor has any demand ever been made upon these defendants or any of them.

Wherefore defendants ask to be dismissed with costs.

3. They re-aver each allegation of paragraph 1 as if copied herein, and aver that the bond aforesaid was never intended to secure, and never did secure, the said D. D. Stewart, or any individual. The United States has never assigned said bond to relator, nor in any way authorized him to make use of its name, nor to maintain any suit or action upon the said bond, and the said relator has no right or authority to maintain this action and the action is not upon behalf of the United States.

Wherefore defendants ask to be dismissed with costs.

4. They re-aver each allegation of paragraph 1 the same as if it was copied herein.

There was a case pending in said court wherein D. D. Stewart was plaintiff and Henry County was defendant. Any money paid or delivered to Warren Watson in said suit was by the voluntary act of the defendant therein, and by and with the consent of the plaintiff, relator herein, who, knowing all the facts, knowing just how the money was paid, made no objection thereto but permitted the same to remain in the hands of said Warren Watson, and any failure of the said Watson to pay over or account for any money so tendered or deposited, did not constitute a failure in the performance of any duty imposed upon him, nor did it constitute any breach of the con-





In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri, at Kansas City.

UNITED STATES OF AMERICA at the Relation of and to the Use of David D. Stewart, Plaintiff,	} No. 2058.
<i>vs.</i>	
FREDERICK HOWARD, JOHN CUTTER GAGE, JAMES LEWIS Lombard, and Witten McDonald, Defendants.	

It is stipulated and agreed in the above-entitled case as follows:

1. That a trial by jury is waived.
2. That the case be submitted to Judge E. B. Adams now holding said court at Kansas City, on a statement of facts to be agreed upon or if any fact or facts cannot be agreed upon, then as to such either party may establish the same by depositions to be taken hereafter in the usual form.
3. Each party shall prepare and submit to the other a brief, and the party so receiving such brief may thereafter supplement his brief by any additional points or authorities and the whole case shall thus be submitted and thereupon, if either party so desire, the case shall be orally argued before Judge Adams at his chambers in St. Louis, Missouri, at such time as he may name.
4. When the statement of facts have been agreed upon, depositions taken if such be necessary, and briefs completed, the whole, with the pleadings shall be forwarded to Judge Adams, to be further disposed of as he may direct.
5. Either party may ask such declarations of law as he may wish, but copies of the same to be furnished to adverse party.
6. At any time before the briefs as aforesaid have been completed, either party may amend his pleadings in such way as he may choose.

FRANK HAGERMAN, *For Def'ts.*  
KARNES, HOLMES & KRAUTHOFF,  
*Att'ys for Pl'ff.*

Said reply is in words and figures as follows:

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri, at Kansas City.

UNITED STATES OF AMERICA at the Relation of and to the Use of David D. Stewart, Plaintiff,	} No. 2058.
<i>against</i>	
FREDERICK HOWARD, JOHN CUTTER GAGE, JAMES LEWIS Lombard, and Witten McDonald, Defendants.	

The plaintiff, for reply to the answer of the defendants, says that a copy of the bond as set out in the first paragraph of defendants'

answer is correct, but plaintiff says that said bond was duly marked approved, and signed by A. Krekel, who was then judge of said court; and that the said parties to said bond duly qualified as to the amount of property owned by each, and which qualification of the several sureties was filed with said bond.

For reply to the second paragraph of said answer, the plaintiff asserting that he was not required to make proof of any claim against the estate of said Warren Watson, deceased, before he could assert his right in this case as against these defendants, alleges that the estate of the said Warren Watson was duly administered upon and closed in September, 1894, and long before plaintiff's right of action accrued as against these defendants; and except as thus admitted the plaintiff denies each and every allegation in said paragraph.

For reply to the third paragraph of said answer, the plaintiff denies each and every allegation therein contained.

For reply to the fourth paragraph of said answer, plaintiff admits that there was a case pending in said court wherein plaintiff was the plaintiff, and Henry County was defendant, but plaintiff denies each and every other allegation contained in said paragraph.

Wherefore plaintiff prays judgment as in his petition.

KARNES, HOLMES & KRAUTHOFF,  
*Attorneys for Plaintiff.*

11        Thereafter, to wit, on the 15th day of February, 1899, the following entry appears of record in the above-entitled case:

UNITED STATES OF AMERICA at the Relation of and to the	} 2058.
Use of David D. Stewart	
<i>against</i>	
FREDERICK HOWARD ET AL.	

Now on this day come the parties by their attorneys, the plaintiff by Mr. Edwin A. Krauthoff and the defendants by Messrs. Gage, Ladd & Small, and Mr. Frank Hagerman. Thereupon a stipulation in writing, waiving a jury, and an agreed statement of facts are filed, and this case coming on for hearing upon the pleadings and agreed statement of facts, the hearing of the same is proceeded with before the court without the intervention of a jury, and after hearing the arguments of counsel, the case is submitted to the court and taken under advisement.

Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division  
of the Western District of Missouri.

THE UNITED STATES OF AMERICA *ex Rel.* DAVID D. STEWART,  
Plaintiff,  
*vs.*  
FREDERICK HOWARD ET AL., Defendants. }

It is stipulated and agreed between the parties hereto that a jury  
is hereby waived, and that this cause shall be tried and determined  
by the court without the intervention of a jury.

J. V. C. KARNES,  
L. C. KRAUTHOFF,  
NEW & KRAUTHOFF,  
*Attorneys for Plaintiffs.*  
GAGE, LADD & SMALL,  
*Attorneys for Defendant.*

Said agreed statement of facts is in words and figures as follows :

In the Circuit Court of the United States within and for the Western  
Division of the Western District of Missouri.

THE UNITED STATES OF AMERICA *ex Rel.* DAVID D. STEWART,  
Plaintiff,  
*vs.*  
FREDERICK HOWARD ET AL., Defendants. }

*Agreed Statement of Facts.*

It is agreed between the parties hereto that the facts herein are as  
follows :

12 1. Upon March 3rd, 1887, Warren Watson was appointed  
clerk of the United States circuit court for the western divis-  
ion of the western district of Missouri, and acted as such from  
that date until his death, which occurred on the 24th day of March,  
1892.

Upon March 3rd, 1887, Warren Watson, with these defendants,  
executed his bond as such clerk, in words and figures as follows :

Know all men by these presents, that we, Warren Watson, Fred-  
erick Howard, John Cutter Gage, James Lewis Lombard, Witten  
McDonald, of the city of Kansas in the county of Jackson, State of  
Missouri, are held and firmly bound unto the United States of  
America in the sum of twenty thousand dollars, lawful money of  
the said United States, to be paid to the said United States, for which  
payment, well and truly to be made, we bind ourselves, our heirs,  
executors and administrators, jointly and severally firmly by these  
presents.

Signed with our hands and sealed with our seals, this 3rd day of  
March, 1887.

The condition of the above obligation is such, whereas, the said

Warren Watson has, pursuant to law, been appointed to be clerk of the circuit court of the United States, for the western division of the western district of Missouri, as by order of appointment bearing date the 3rd day of March, 1887, and recorded on page 70 of Book "Law D" of the records of said court will more fully appear.

Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments and determinations of said court, then this obligation to be void; otherwise to remain in full force and virtue.

WARREN WATSON.

FREDERICK HOWARD.

JOHN CUTTER GAGE.

JAMES LEWIS LOMBARD.

WITTEN McDONALD.

[SEAL.]  
[SEAL.]  
[SEAL.]  
[SEAL.]  
[SEAL.]

Approved:

A. KREKEL, *Judge*.

This is the same bond mentioned in the petition and copied in the answer, and was the only bond ever executed by defendants or on behalf of Watson as such clerk. It was at the time of its execution approved by A. Krekel, a then judge of said court, who endorsed his approval thereon, and each of the parties to said bond qualified in writing as to the amount of property owned by each, which qualification was filed with said bond.

13      2. Warren Watson was a resident of Jackson county, Missouri, and while still acting as such clerk, died on the 24th day of March, 1892, and on the 2nd day of April, 1892, Fred W. Perkins was by the probate court of said county, duly appointed as his administrator and as such, on the 5th day of April, 1892, gave the notices required by the statutes of Missouri for the presentation of claims against said Watson's estate. On the 11th day of September, 1894, said estate having been completely administered upon, was closed and the administrator discharged. At no time did the United States or David D. Stewart, the relator, ever exhibit or present any demand or claim against said estate in said probate proceedings, or as provided by the laws of Missouri for exhibiting or presenting claims against the estates of decedents.

The amount of demands allowed against the estate of said Warren Watson and assigned to the fifth class is \$2,730.91, and on this sum there was paid a dividend of 0331 per cent., or in the aggregate, \$90.41 and no more.

3. On February 6th, 1891, the relator, David D. Stewart, as plaintiff, instituted in said United States circuit court his suit at law against Henry County, Missouri, in which his causes of action were set forth, in a petition containing three counts, the first asking a judgment for \$1,010.00 with interest from the 1st day of September, 1887, on a bond of defendant for \$1,000, dated July 1st, 1882, payable at the National Bank of Commerce of New York on July 1st, 1892, with six per cent. interest, evidenced by coupons, but at the option of the county, the bond was payable at any time after July 1st, 1887. The second count was upon a similar bond, for \$1,000, and the third count was on a like bond for \$500.00.

On March 3rd, 1891, defendant, Henry County, filed in said cause its answer, said answer as to each of the first and second counts being: that on September 6th, 1887, there was due on said bond \$1,010.00 and on that date it deposited that sum in the National Bank of Commerce of New York, for the payment of the bond and interest, and on September 6th, 1887, tendered that sum to the plaintiff as full payment of the bond and interest thereon, but plaintiff refused to accept same, "and defendant says it has at all times been ready and willing to pay plaintiff said sum of \$1,010.00 in full payment of said bond and unpaid interest and now here again tenders to plaintiff said sum of \$1,010 in full payment of said bond and unpaid interest due thereon on September 6th, 1887, and now brings the said sum into court." The answer to the third count was exactly the same, except that the amount named was \$505.00, instead of \$1,010.00.

14 Upon March 3rd, 1891, there was entered on the records of said court the following:

"This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of \$2,525.00 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein."

On June 27, 1891, the plaintiff in said suit filed his reply, which was a general denial.

On July 2, 1894, there was entered on the records of said court the following:

"This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court and by the court taken under advisement with leave to the parties to file briefs."

On February 11, 1895, there was entered on the records of said court the following:

A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel and taken under advisement by the court, and the court being now fully advised in the premises doth find the issues as follows, to wit: On the first count of the petition, the court finds that the principal and interest on bond No. 204 was duly tendered by defendant at the place of payment on the first day of September, 1887, and that after the plaintiff instituted this action in this court, and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of \$1,010.00.

(The findings as to the second and third counts are precisely similar, except as to the amounts, the second count being \$1,010.00 and the third \$505.00.)

It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars (\$2,525.00) the aggregate amount found to be owing to him under the three counts of the petition and that plaintiff pay the costs of this action and that execution issue therefor.

And it further appearing to the court that the said sum of \$2,525.00 so paid into court as aforesaid, was paid and received by Warren Watson the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk or otherwise. It is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid. No appeal was taken from this judgment, and the same has become final and remains in full force and effect and unpaid.

4. On March 3rd, 1891, Henry County did hand to Warren Watson the sum of \$2,525.00 as in said entry of that date recited.

No order or direction of the court as to this money was ever made, had or obtained and no entry in reference to the same was ever made, except as set out in paragraph 3.

When the \$2,525.00 was so paid to said Warren Watson, he, on the same day, deposited the same in a bank to his own credit, and at no time did he treat the money as in the depository of the court. He never at any time presented any account to the court of such money, and has never paid it to Henry County or David D. Stewart and never during the pendency of the suit of Stewart vs. Henry County, did either party take any steps towards having any order made in relation to the said money, other than was actually made, nor make any objection to the method in which said money was received.

David D. Stewart had no knowledge of said acts of Warren Watson.

5. At no time was demand made on these defendants or Warren Watson for said money other than is to be inferred from the institution of the suit.

6. A jury is waived, and the answer of defendants shall be regarded as verified.

The above and foregoing are all the facts in the case and are to be taken subject to objections by either party as to their relevancy and competency.

J. V. C. KARNES,  
L. C. KRAUTHOFF,  
NEW & KRAUTHOFF,  
*For Plaintiffs.*  
FRANK HAGERMAN,  
SANFORD B. LADD,  
*Attys for Defendants.*



16 Thereafter, to wit, on the 17th day of April, 1899, the following answer and stipulation was filed in the above-entitled case:

In the Circuit Court of the United States within and for the Western Division of the Western District of the State of Missouri.

UNITED STATES <i>ex Rel.</i> STEWART	} No. 2058.
<sup>vs.</sup> FREDERICK HOWARD ET AL.	

Now comes Witten McDonald, one of the defendants in the above-entitled cause, and for answer therein states that heretofore, to wit, on December 16, 1898, in the district court of the United States, within and for the southern division of the western district of Missouri, he was duly adjudged a bankrupt under the act of Congress relating to bankruptcy, and that thereafter, to wit, on April 6, 1899, he was by said court duly and fully discharged from all debts provable against his estate under said bankrupt act, except such debts as are excepted by law from such discharges, and that in and by said discharge from the debts provable against his estate as aforesaid, the said defendant, Witten McDonald, became and is fully discharged from all liability to the relator and plaintiff by reason of the matters and things complained of in the petition herein.

And this defendant having fully answered prays to be hence discharged with his costs.

DAN'L B. HOLMES,  
*Attorney for said Defendant.*

The undersigned attorneys for the plaintiff in the above-entitled cause do hereby consent that the foregoing answer of Witten McDonald may be filed therein and do admit the truth of the statement in said answer of the adjudication of bankruptcy, by said McDonald, and of his discharge on April 6, 1899, from all debts provable against his estate under the act of Congress relating to bankruptcy, except such debts as are excepted by law from such discharges.

Kansas City, Mo., April 14, 1899.

E. A. KRAUTHOFF,  
J. V. C. KARNES,  
*Attorneys for Plaintiff.*

Thereafter, to wit, on the 25th day of April, 1899, an opinion was filed in the above-entitled cause.

17 Thereafter, to wit, on Wednesday, the 26th day of April, 1899, the same being a day of the regular April term of said court, the following entry appears of record in the above-entitled cause:

THE UNITED STATES OF AMERICA at the Relation and to the Use of David D. Stewart <i>against</i>	} 2958.
FREDERICK HOWARD, JOHN CUTTER GAGE, JAMES LEWIS Lombard, Witten McDonald.	

This case having been heretofore submitted to the court upon the pleadings and proofs in the form of an agreed statement of facts, a trial by jury having been duly waived by a stipulation in writing filed herein, now the court being fully advised in the premises doth at the request of defendants make and file a special finding of facts, the same being the facts so agreed upon and does find the issues for the plaintiff and against all of the defendants with the exception of Witten McDonald, and assesses the damages in the sum of \$2,525.00 with interest thereon at six per cent. per annum from the date of the filing of the petition herein, to wit: October 19, 1895, making a total of \$3,057.77. The court finds the issues in favor of said Witten McDonald.

It is therefore considered, ordered and adjudged by the court that said defendant, Witten McDonald, go hence without day and recover of David D. Stewart his costs herein laid out and expended and have thereof execution.

It is further considered, ordered and adjudged by the court that the United States of America, at the relation and to the use of David D. Stewart, recover of the defendants, Frederick Howard, John Cutter Gage, and James Lewis Lombard the sum of twenty thousand dollars, being the penalty of the bond in suit, to be satisfied by the payment of the sum of three thousand and fifty-seven dollars and seventy-seven cents (\$3,057.77) the damages found to be due by the court and the costs of this action, and that execution issue therefor.

Said special finding of facts is in words and figures as follows:

In the Circuit Court of the United States for the Western Division  
of the Western District of Missouri, at Kansas City.

UNITED STATES OF AMERICA at the Relation of and to the Use of David D. Stewart, Plaintiff, <i>vs.</i>	} No. 2058.
FREDERICK HOWARD, JOHN CUTTER GAGE, JAMES LEWIS Lombard, and Witten McDonald, Defendants.	

*Special Findings of Fact.*

This cause came on for hearing on the written stipulation of the parties waiving a jury, and upon an agreed statement of facts,  
18 and a separate stipulation as to defendant Witten McDonald.  
No other testimony was offered in the case.

Thereupon the court sitting as a jury, does, in accordance with said agreed statement of facts, and at the request of the counsel for the defendants, specially find the facts herein as follows:

1. Upon March 3, 1887, Warren Watson was appointed clerk of

the United States circuit court for the western division of the western district of Missouri, and acted as such from that date until his death, which occurred on the 24th day of March, 1892.

Upon March 3, 1887, said Warren Watson, with these defendants, executed his bond as such clerk, in words and figures as follows:

Know all men by these presents: That we, Warren Watson, Frederick Howard, John Cutter Gage, James Lewis Lombard, Witten McDonald, of the city of Kansas — in the county of Jackson, State of Missouri, are held and firmly bound unto the United States of America, in the sum of twenty thousand dollars, lawful money of the said United States to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals, this 3rd day of March, 1887.

The condition of the above obligation is such, — whereas the said Warren Watson has, pursuant to law, been appointed to be clerk of the circuit court of the United States for the western division of the western district of Missouri, as by order of appointment bearing date the 3rd day of March, 1887, and recorded on page 70 of Book Law D of the records of said court will more fully appear.

Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments and determinations of said court, then this obligation to be void; otherwise to remain in full force and virtue.

WARREN WATSON.  
FREDERICK HOWARD.  
JOHN CUTTER GAGE.  
JAMES LEWIS LOMBARD.  
WITTEN McDONALD.

[SEAL.]  
[SEAL.]  
[SEAL.]  
[SEAL.]  
[SEAL.]

Approved:

A. KREKEL, *Judge.*

This is the same bond mentioned in the petition and copied in the answer, and was the only bond ever executed by defendants or on behalf of Watson as such clerk. It was at the time of its execution approved by A. Krekel, a then judge of said court, who endorsed his approval thereon, and each of the parties to said bond qualified in writing as to the amount of property owned by each, which qualification was filed with said bond.

2. Warren Watson was a resident of Jackson county, Missouri, and while still acting as such clerk, died on the 24th day of March, 1892, and on the 2nd day of April, 1892, Fred W. Perkins was by the probate court of said county, duly appointed as his administrator and as such, on the 5th day of April, 1892, gave the notices required by the statutes of Missouri for the presentation of claims against said Watson's estate. On the 11th day of September, 1894, said estate having been completely administered upon, was closed and the administrator discharged. At no time did the United States, or

David D. Stewart, the relator, ever exhibit or present any demand or claim against said estate in said probate proceedings, or as provided by the laws of Missouri for exhibiting or presenting claims against the estates of decedents.

The amount of demands allowed against the estate of said Warren Watson and assigned to the fifth class is \$2,630.91 and on this sum there was paid a dividend of .0331 per cent. or in the aggregate \$90.41 and no more.

3. On February 6, 1891, the relator, David D. Stewart, as plaintiff, instituted in said United States circuit court his suit at law against Henry County, Missouri, in which his causes of action were set forth in a petition containing three counts, the first asking a judgment for \$1,010.00 with interest from the 1st day of September, 1887, on a bond of defendant for \$1,000.00 dated July 1, 1882, payable at the National Bank of Commerce of New York on July 1, 1892, with 6 per cent. interest, evidenced by coupons, but at the option of the county the bond was payable at any time after July 1st, 1887. The second count was upon a similar bond for \$1,000 and the third count was on a like bond for \$500.00.

On March 3rd, 1891, defendant, Henry County, filed in said cause its answer, said answer as to each of the first and second counts being that on September 6th, 1887, there was due on said bond \$1,010.00 and on that date it deposited that sum in the National Bank of Commerce of New York, for the payment of the bond and interest, and on September 6th, 1887, tendered that sum to the plaintiff as full payment of the bond and interest thereon, but plaintiff refused to accept same, "and defendant says it has at all times been ready and willing to pay plaintiff said sum of \$1,010.00 in full payment of said bond, and unpaid interest, and now here again tenders to plaintiff said sum of \$1,010.00 in full payment of said bond and unpaid interest due thereon on September 6th, 1887, and now brings the said sum into court." The answer to the third count was exactly the same except that the amount named was \$505.00 instead of \$1,010.10.

Upon March 3rd, 1891, there was entered on the records of said court in said cause the following:

"This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of \$2,525.00 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein."

On June 27th, 1891, the plaintiff in said suit filed his reply, which was a general denial.

On July 2, 1894, there was entered on the records of said court in said cause the following:

"This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court

and by the court taken under advisement with leave to the parties to file briefs."

On February 11, 1895, there was entered on the records of the said court in said cause the following:

"A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 204 *was* duly tendered by defendant at the place of payment on the first day of September, 1887, and that after the plaintiff instituted this action in this court and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff, and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of \$1,010.00."

(The findings as to the second and third counts are precisely similar except as to the amounts, the second count being \$1,010.00 and the third \$505.00.)

It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars (\$2,525.00), the aggregate amount found to be owing to him under the three counts of the petition, and that plaintiff pay the costs of this action, and that execution issue therefor.

And it further appearing to the court that the said sum of \$2,525.00 so paid into court as aforesaid, was paid to and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk or otherwise, it is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid. No appeal was taken from this judgment, and the same has become final and remains in full force and effect and unpaid.

4. On March 3rd, 1891, Henry County did hand to Warren Watson the sum of \$2,525.00 as in said entry of that date recited.

No order or direction of the court as to this money was ever made, had or obtained and no entry in reference to the same was ever made, except as set out in paragraph 3.

When the \$2,525.00 was so paid to said Warren Watson, he on the same day, deposited the same in a bank to his own credit, and at no time did he treat the money as in the depository of the court. He never at any time presented any account to the court of such money, and has never paid it to Henry County or David D. Stewart, and never during the pendency of the suit of Stewart vs.

Henry County did either party take any steps towards having any order made in relation to the said money, other than was actually made, nor make any objection to the method in which said money was received.

David D. Stewart had no knowledge of said acts of Warren Watson.

5. At no time was demand made on these defendants or Warren Watson for said money other than is to be inferred from the institution of the suit.

The court further finds that the defendant, Witten McDonald, has been discharged of any obligation on his part to the plaintiff by reason of a discharge duly granted him by the United States 22 district court for the southern division of the eastern district of Missouri in bankruptcy; that said discharge was duly granted and said proceedings duly had.

Upon the finding of facts above made the court concludes as a matter of law that the relator is entitled to judgment against the defendants Howard, Gage and Lombard for the sum of \$2,525.00 with interest at six per cent. from the date of the filing of the petition herein, October 19, 1895, a total of \$3,057.77, and that defendant, Witten McDonald, is entitled to judgment in his favor.

Dated Kansas City, Missouri, April 26, 1899.

(Signed)

ELMER B. ADAMS, *Judge*.

Thereafter, to wit, on the 2nd day of June, 1899, the following entry appears of record in the above-entitled case:

UNITED STATES <i>ex Rel.</i> STEWART	} 2058.
<i>vs.</i>	
FREDERICK HOWARD ET AL.	

This day come defendants by their attorneys and file assignment of errors and application for writ of error.

Said assignment of errors (*are*) in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE UNITED STATES to the Use of DAVID D. STEWART,	} At Law.
Plaintiff,	
<i>vs.</i>	
FREDERICK HOWARD, WITTEN McDONALD, JAMES L. LOMBARD, and John C. Gage, Defendants.	

The defendants in this action, Frederick Howard, James L. Lombard, and John C. Gage, in connection with their petition for a writ of error, make the following assignment of errors, which they aver occurred upon trial of the cause, to wit:

I. The court erred in entering judgment in favor of the plaintiff and against these defendants.

II. That upon the agreed statement of facts and upon the facts in

the case as found by the court, the judgment ought to have been in favor of these defendants and against the plaintiff, whereas said judgment was in favor of the plaintiff and against these defendants.

SANFORD B. LADD,  
FRANK HAGERMAN,

*Attorneys for said Defendants.*

23 Said petition for writ of error is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE UNITED STATES to the Use of DAVID D. STEWART,  
Plaintiff,

vs.

FREDERICK HOWARD, WITTEN McDONALD, JAMES L. LOMBARD, and John C. Gage, Defendants.

} At Law.

*Petition for Writ of Error.*

Now come Frederick Howard, James L. Lombard and John C. Gage, defendants herein, and say that on or about the 26th day of April, 1899, this court entered judgment herein in favor of the plaintiff and against these defendants in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors which is filed with and attached to this petition.

Wherefore the defendants, Frederick Howard, James L. Lombard and John C. Gage pray that a writ of error may issue in this behalf to the United States circuit court of appeals, for the eighth circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said circuit court of appeals.

SANFORD B. LADD,  
FRANK HAGERMAN,

*Attorneys for said Defendants.*

Defendant, Witten McDonald, declines to join in this petition.

DAN'L B. HOLMES,  
*Attorney for Witten McDonald.*

The bond for writ of error, filed on the 6th day of June, A. D. 1899, is in words and figures as follows:

UNITED STATES OF AMERICA, *set*:

Know all men by these presents, that we, Frederick Howard, James L. Lombard and John C. Gage, as principal-, and Sanford B. Ladd and Edward F. Swinney, as sureties, are held and firmly bound unto the United States, to the use of David D. Stewart, in the



full and just sum of sixty-five hundred dollars, to be paid to the said United States to the use of David D. Stewart, his heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

24 Sealed with our seals and dated this — day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately, at the April term of the circuit court of the United States for the western division of the western district of Missouri, in a suit depending in said court between the United States to the use of David D. Stewart, plaintiff, and Frederick Howard, James L. Lombard and John C. Gage, defendants, judgment was rendered against the said defendants and the said defendants have obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing it and him to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said defendants shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good said plea, then the above obligation to be void, else to remain in full force and virtue.

FREDERICK HOWARD.	[SEAL.]
JOHN C. GAGE.	[SEAL.]
JAMES L. LOMBARD.	[SEAL.]
SANFORD B. LADD.	[SEAL.]
EDWARD F. SWINNEY.	[SEAL.]

Signed and sealed in the presence of—

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The above bond is hereby approved and ordered to be filed and made a part of the record.

(Signed)

AMOS M. THAYER, *Judge.*

UNITED STATES OF AMERICA, }  
Western District of Missouri, } ss :

Sanford B. Ladd, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth over and above all his debts and liabilities the sum of ten thousand dollars; and that he owns property to that amount, subject to execution, in the State of Missouri.

SANFORD B. LADD.

Subscribed and sworn to before me this twentieth day of May, A. D. 1899.

My term expires March 15th, 1903.

[SEAL.]

SAMUEL R. HALSTEAD,  
*Notary Public, Jackson County, Mo.*

25 UNITED STATES OF AMERICA, } ss:  
*Western District of Missouri,* }

Edward F. Swinney, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth over and above all his debts and liabilities the sum of ten thousand dollars, and that he owns property to that amount, subject to execution, in the State of Missouri.

EDWARD F. SWINNEY.

Subscribed and sworn to before me this 23rd day of May, A. D. 1899.

Commission expires July 12, 1901.

C. G. HUTCHESON,

*Notary Public, Jackson County, Mo.*

[SEAL.]

Said opinion, so filed as aforesaid, is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division  
of the Western Judicial District of Missouri.

THE UNITED STATES OF AMERICA at the Relation and to the  
Use of David D. Stewart, Plaintiff,  
vs.  
FREDERICK HOWARD ET AL., Defendants.

ADAMS, *District Judge:*

This is a suit instituted against the defendants as sureties on the official bond of the late Warren Watson as clerk of this court, to recover a sum of money alleged to have been deposited with him as such clerk by Henry County, Missouri, on the 3rd day of March, 1891, in a suit then pending in this court in which the relator was plaintiff and Henry County was defendant, and to have been afterwards embezzled by him.

The defences are two: First, that the relator is not authorized to sue on the bond in question because the United States of America is the sole obligee, and no statute of the United States authorizes a suit thereon at the relation or to the use of an individual; second, that the clerk did not take possession of the money tendered by virtue of his office as such clerk.

These two defences will be considered in the order stated. Section 795 of the Revised Statutes of the United States provides as follows:

“The clerk of every court shall give bond in the sum to be fixed and with sureties to be approved by the court which appoints him, faithfully to discharge the duties of his office, and seasonably  
26 to record the decrees, judgments and determinations of the court of which he is clerk.”

No language is here found which expressly authorizes any person who may be wronged by the act of the clerk to resort to this bond,

or to use the name of the obligee, the United States of America, in a suit on a bond to his use, for the redress of his wrong, but the question arises whether such right is given by necessary legal intendment.

The bond, with the condition as found in the statute, is the only one which can be required of a clerk of this court. *United States vs. Tingey*, 5 Pet., 115. It must be observed at the outset that this condition is comprehensive in its scope, and manifestly contemplates a security for the discharge, on the part of the clerk, of all such duties as the law imposes upon him. Among these duties are receiving, keeping and paying out money pursuant to the requirements of a statute or an order of court. Such duties are imposed by secs. 995, 996 of the Rev. Stat. of the United States. It is true the duty is imposed on the clerk, whenever he receives money, to forthwith deposit the same in the registry of the court, in the name and to the credit of the court, but it clearly appears from the statutes just referred to that it is made the duty of the clerk to receive money, to deposit money in the registry of the court, and to pay it out only as and when ordered by the court. For the faithful performance of these duties and each of them, the bond is required of the clerk, and the sureties on such bonds become the clerk's sponsors therefor. Now, it is well known both from the character of the jurisdiction conferred upon circuit courts, as well as from the practical administration and exercise of such jurisdiction, that the money involved in litigation in such courts belongs almost exclusively to individual suitors and rarely ever to the United States. It is the district court which affords the usual jurisdiction for asserting the rights or redressing the wrongs of the United States as such. So far as clerks of circuit court are concerned, their duties, with respect to receiving, depositing and paying out money, concern mainly individual suitors other than the United States. The condition of the bond in question should therefore be construed in the light of these facts, and when legislative authority is conferred to require from a clerk a bond conditioned for the faithful discharge of his duties, it is not doubted that the legislature intended that the obligation of such bond should have relation at least to that duty which above all others requires a guaranty for its faithful performance, namely, the faithful accounting for moneys which may come into the clerk's hands by virtue of his office. Such duties and obligations  
 27 being imposed upon the clerk, the bond required of him ought, if possible, to be commensurate therewith.

It is held in the case of *Washington ex rel. McCue vs. Young*, 10 Wheat., 406, that no person can be authorized to use the name of another without his assent, given in fact or by legal intendment. It is my opinion that, in imposing upon clerks of the circuit court the duties above alluded to, which so necessarily and vitally affect the interests of suitors in its courts, and in requiring from such clerk a bond for the faithful discharge of such duties,—the United States, by necessary legal intendment, thereby consents to the use of its name by suitors wronged by official misconduct of the clerk, in a suit against the clerk or his sureties on his official bond. This im-

plied authority or necessary legal intendment becomes the more apparent when it is considered that the clerk's office is an agency of the United States Government, ordained and established for the use and convenience of its people. The money entrusted to its clerk, is, in a large sense, money which the Government has undertaken to keep for its people. When, therefore, the clerk, by official misconduct, embezzles or misappropriates such money, even though perhaps the Government may not be subjected to a suit for its recovery, it clearly owes a highly moral and meritorious obligation to the loser, in the nature of a responsibility for the act and misconduct of its agent, and one which the National Congress might regard as sufficient to move it to a private act for his relief.

Considering all these things, it seems unreasonable to say that all Congress intended, by providing for a bond from clerks of the circuit court, was to secure the United States itself against damage by official misconduct. On the contrary, the language of the act, construed in the light of the duties imposed upon the clerk, and in the light of the obligations of the United States in the performance of its governmental functions, connected therewith, conduce plainly to the result that such bond is intended for security for all suitors in this court, and being so intended, an implied authority necessarily arises permitting such suitor to put the bond in suit in the name of the United States to his use, for the redress of wrongs within the purview of the bond.

The next question to be considered is whether Clerk Watson had the money in question in his possession by virtue of his office as clerk. It is contended that it was entrusted to him by Henry county to keep good a tender before that time made, and much research and learning have been exhibited to show that this was but a private or personal transaction between the clerk, as an individual, and Henry county, and that the money was never *in custodia legis*, and never in the hands of the clerk by virtue of his office. It is contended that the statutes of the State of Missouri, secs. 2937 and 2939, in relation to tender, have no application, under the Federal Statutes in relation to costs, and the practice in the Federal court, to the facts of this case. To all these suggestions and to all the authorities relied upon, I have given attentive consideration, but there is one view of the facts, which in my opinion is conclusive of the question now under consideration. The money appears to have been received by the clerk with such sanction of the court as, in my mind, is equivalent to an order to that effect made by the court. The facts disclosed by the agreed statement are as follows:

Henry county having, before the suit was brought against it by Stewart, made a tender of a certain amount in full satisfaction of the cause of action sued upon, when it came to answer the petition of Stewart in this court, alleged as follows: "And defendant says it at all times has been ready and willing to pay plaintiff said sum (\$2,525) and now here again tenders to plaintiff said sum in full payment of said bonds and unpaid interest due thereon, \* \* \* and now brings the said sum into court." This answer was filed on March 3, 1891. On the same day there was entered on the records

of the court the following: "This day comes defendant by its attorney and files answer and tenders to plaintiff and deposits with the clerk the sum of \$2,525.00 in payment and satisfaction of his cause of action in the petition set forth." It further appears as a fact that on said 3rd day of March, 1891, Henry county did hand to Warren Watson, clerk, the sum of \$2,525.00 as in said pleading and entry of record stated. It further appears that after reply was filed in due course, and on July 2, 1894, the following proceedings were had in said cause, a jury having been waived the hearing was proceeded with, the evidence heard and the cause submitted to the court, and afterwards, on February 11, 1895, the following further proceedings were had and entered of record in said cause, that is to say:

"A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and arguments of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 204 was duly tendered by defendant at the place of payment on the 1st day of September, 1887, and that after the plaintiff instituted this action in this court and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of the plaintiff, and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of \$1,010.00." (The findings as to the second and third counts are precisely similar to the one just now quoted, except as to the amounts, the second count being for \$1,010.00, and the third being for \$505.00.) The judgment of the court after finding such facts, proceeds as follows: "It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of \$2,525.00, the aggregate amount found to be owing him under the three counts of the petition, and that the plaintiff pay the costs of this action, and that execution issue therefor. And it further appearing to the court that the said sum of \$2,525 so paid into court as aforesaid, was paid to and received by Warren Watson the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk or otherwise, it is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk aforesaid."

The authorities show, and it is conceded to be the law governing this case, that the money in question must have been delivered to the clerk by some direction of the court, in order to be so in his possession by virtue of his office as to render his sureties liable for its misapplication, but I cannot construe the facts set forth above as they appear in the pleadings, record and judgment in the case of *Stewart vs. Henry County*, without being brought irresistibly to the

conclusion that said money was paid to the clerk with such sanction of the court at the time, as is equivalent to an express order to that effect. It is common knowledge that the record book is the mouth-piece of the court; it is under the direct control of the court, and no entry is made without the sanction of the court. In fact, it appeared affirmatively at the hearing of this case, that the record proceedings on March 3, 1891, showing a deposit of the money in question with the clerk was signed by the judge of the court. The subsequent record entries in the case show that the court at all times regarded the money as under its control. It would be sticking in the back, ignoring altogether the substance of things, to hold that the record in that case does not disclose the taking of the money in question into judicial custody. But it is said that under the statutes

of the United States, secs. 995 and 996, it is not lawful to deposit money with the clerk, and that therefore Clerk Watson did not have possession of the money in question under the law, and hence not at all. Section 995 reads as follows: "All moneys paid into any court of the United States or received by the officers thereof in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer or assistant treasurer or a designated depository of the United States, in the name and to the credit of such court." Sec. 996 reads as follows: "No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges and to be entered and certified of record by the clerk, and every such order shall state the cause in or on account of which it is drawn."

These sections clearly deal with the custody of money after the same may have been received by the officers of the court. In other words, they cannot be construed as a prohibition upon receiving money by the officers of the court. The very language of section 995 makes this clear. It refers to moneys which may be "received by the officers" of the court. This is further made clear by the fact that the court acts alone through its officers, and I know of no method of taking money into legal custody except by and through the instrumentality of the court's officers. It is common practice, when the court is about to take money into judicial custody to order it paid to the clerk. His duty then arises under section 995 above quoted, to deposit it forthwith in the registry of the court. If he fails to do so, he violates his duty, and this is exactly what Clerk Watson did. On receipt of the money in question, he was required by law to forthwith deposit it in the registry of the court. Instead of doing so, he deposited it to his individual credit in some bank where he was keeping his individual account. He thereby violated the law, failed to perform his duty as clerk, and his subsequent use of the money for his own private purposes, is but further evidence of his subversion of the same to his own use. When the court subsequently rendered final judgment in the case of *Stewart vs. Henry County*, it practically ordered this money to be paid to the plaintiff. The right to said money and all legal remedies for the enforcement of the right, were thus vested in the plaintiff. It may or may not



be, as claimed by defendants' counsel (as to which I express no opinion), that plaintiff has a present subsisting right enforceable against Henry county for the payment of his judgment. The assertion of such right, if it exists, would be grossly inequitable, and the court is not inclined to so rule this case as to unnecessarily invite such proceeding.

It results that plaintiff is entitled to judgment for the penalty of the bond, with an assessment of damages in the sum of  
 31 \$2,525.00 with interest thereon from the date of the institution of this suit at the rate of six per cent. per annum.

UNITED STATES OF AMERICA, *set* :

I, Adelaide Utter, clerk of the circuit court of the United States, for the western division of the western district of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the record, assignment of errors and all proceedings in the case entitled United States *ex rel.* Stewart *vs.* Frederick Howard *et al.*, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said circuit court. Done at office in Kansas City, Missouri, this 28 day of June, A. D. 1899.  
 Seal of the United States Circuit Court for the Western District of Missouri, Western Division.

ADELAIDE UTTER, *Clerk.*

[Cancelled 10c. U. S. rev. stamp.]

Filed Jul- 8, 1899.

JOHN D. JORDAN, *Clerk.*

32 And on the eighth day of July, A. D. 1899, an appearance of counsel for plaintiffs in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

FREDERICK HOWARD ET AL., Plaintiffs in Error,	} No. 1288.
<i>vs.</i>	
UNITED STATES to the Use of DAVID D. STEWART ET AL.	

The clerk will enter my appearance as counsel for the plaintiffs in error.

SANFORD B. LADD.  
 FRANK HAGERMAN.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1288. Frederick Howard *et al.*, plaintiffs in error, *vs.* United States to the use of David D. Stewart *et al.* Appearance. Filed Jul- 8, 1899. John D. Jordan, clerk. Sanford B. Ladd, Frank Hagerman, counsel for plffs in error.

And on the fourth day of August, A. D. 1899, an appearance of counsel for defendant in error Stewart was filed in the clerk's office of said circuit court of appeals in the words and figures following:



United States Circuit Court of Appeals, Eighth Circuit, May Term,  
1899.

FREDERICK HOWARD ET AL., Plaintiffs in Error, <i>vs.</i> THE UNITED STATES to Use of DAVID D. STEWART and Witten McDonald.	}	No. 1288.
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33 The clerk will enter *my* appearance as counsel for the defendant in error David D. Stewart.

J. V. C. KARNES.  
ALEXANDER NEW.  
EDWIN A. KRAUTHOFF.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1288. Frederick Howard *et al.*, plaintiffs in error, *vs.* The United States to use of David D. Stewart *et al.* Appearance. Filed Aug. 4, 1899. John D. Jordan, clerk. J. V. C. Karnes, Alexander New, Edwin A. Krauthoff, counsel for defendant in error David D. Stewart.

And on the fourth day of August, A. D. 1899, an appearance of counsel for defendant in error McDonald was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term,  
1899.

FREDERICK HOWARD ET AL., Plaintiffs in Error, <i>vs.</i> THE UNITED STATES to Use of DAVID D. STEWART and Witten McDonald.	}	No. 1288.
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The clerk will enter my appearance as counsel for the defendant in error Witten McDonald.

DAN'L B. HOLMES.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1288. Frederick Howard *et al.*, plaintiffs in error, *vs.* The United States to use of David D. Stewart *et al.* Appearance. Filed Aug. 4, 1899. John D. Jordan, clerk. Daniel B. Holmes, counsel for defendant in error Witten McDonald.

34 And on the eighth day of January, A. D. 1900, in the record of the proceedings of said circuit court of appeals, is an entry in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, January 8, 1900.

FREDERICK HOWARD ET AL., Plaintiffs in Error,	} No. 1288.
<i>vs.</i>	
THE UNITED STATES to the Use of DAVID D. Stewart <i>et al.</i>	

In error to the circuit court of the United States for the western district of Missouri.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Frank Hagerman in behalf of the plaintiffs in error, but, not being concluded at the hour of adjournment, the further hearing of this cause was postponed until tomorrow morning.

And on the ninth day of January, A. D. 1900, in the record of the proceedings of said circuit court of appeals, is an order of submission in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

TUESDAY, January 9, 1900.

FREDERICK HOWARD ET AL., Plaintiffs in Error,	} No. 1288.
<i>vs.</i>	
THE UNITED STATES to the Use of DAVID D. Stewart <i>et al.</i>	

In error to the circuit court of the United States for the western district of Missouri.

This cause having been called this day for further hearing, argument was continued by Mr. Frank Hagerman for the plaintiffs in error and concluded by Mr. Edwin A. Krauthoff for the defendant in error. Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the ninth day of April, A. D. 1900, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

36 United States Circuit Court of Appeals, Eighth Circuit,  
December Term, A. D. 1899.

FREDERICK HOWARD, JAMES L. LOMBARD, and John C. Gage, Plaintiffs  
in Error,

vs.

THE UNITED STATES to the Use of  
David D. Stewart and Witten  
McDonald, Defendants in Error.

No. 1288. In Error to the  
Circuit Court of the United  
States for the Western Dis-  
trict of Missouri.

Mr. Frank Hagerman (Mr. Sanford B. Ladd and Mr. Willard P. Hall were with him on the brief) for plaintiffs in error.

Mr. Edwin A. Krauthoff (Mr. J. V. C. Karnes, Mr. Alexander New and Mr. David D. Stewart were with him on the brief) for defendants in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

By stipulation in writing the parties waived a jury and tried this action before the court on the following agreed statement of facts:

"It is agreed between the parties hereto that the facts herein are as follows:

"1. Upon March 3rd, 1887, Warren Watson was appointed clerk of the United States circuit court for the western division of the western district of Missouri, and acted as such from that date until his death, which occurred on the 24th day of March, 1892.

"Upon March 3rd, 1887, Warren Watson, with these defendants, executed his bond as such clerk, in words and figures as follows:

"Know all men by these presents that we, Warren Watson, Frederick Howard, John Cutter Gage, James Lewis Lombard, Witten McDonald, of the city of Kansas in the county of Jackson, State of Missouri, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the said United States to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents.

"Signed with our hands and sealed with our seals, this 3rd day of March, 1887.

37 "The condition of the above obligation is such, whereas, the said Warren Watson has pursuant to law, been appointed to be clerk of the circuit court of the United States, for the western division of the western district of Missouri, as by order of appointment bearing date the 3rd day of March, 1887, and recorded on page 70 of Book 'Law D' of the records of said court will more fully appear.

"Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments and determinations of

said court, then this obligation to be void; otherwise to remain in full force and virtue.

WARREN WATSON.	[SEAL.]
FREDERICK HOWARD.	[SEAL.]
JOHN CUTTER GAGE.	[SEAL.]
JAMES LEWIS LOMBARD.	[SEAL.]
WITTEN McDONALD.	[SEAL.]

"Approved:

A. KREKEL, *Judge.*

"This is the same bond mentioned in the petition and copied in the answer, and was the only bond ever executed by defendants or on behalf of Watson as such clerk. It was at the time of its execution approved by A. Krekel, a then judge of the said court, who endorsed his approval thereon, and each of the parties to said bond qualified in writing as to the amount of property owned by each, which qualification was filed with said bond.

"2. Warren Watson was a resident of Jackson county, Missouri, and while still acting as such clerk, died on the 24th day of March, 1892, and on the 2nd day of April, 1892, Fred W. Perkins was by the probate court of said county, duly appointed as his administrator and as such, on the 5th day of April, 1892, gave the notices required by the statutes of Missouri for the presentation of claims against said Watson's estate. On the 11th day of September, 1894, said estate having been completely administered upon, was closed and the administrator discharged. At no time did the United States or David D. Stewart, the relator, ever exhibit or present any demand or claim against said estate in said probate proceedings, or as provided by the laws of Missouri for exhibiting or presenting claims against the estates of decedents.

"The amount of demands allowed against the estate of said Warren Watson and assigned to the fifth class is \$2,730.91, and on this sum there was paid a dividend of 0.331 per cent., or in the aggregate, \$90.41 and no more.

"3. On February 6th, 1891, the relator, David D. Stewart, as plaintiff, instituted in said United States circuit court his suit at law against Henry County, Missouri, in which his causes of action were set forth, in a petition containing three counts, the first asking a judgment for \$1,010.00 with interest from the 1st day of September, 1887, on a bond of defendant for \$1,000, dated July 1st, 1882, payable at the National Bank of Commerce of New York on July 1st, 1892, with six per cent. interest, evidenced by coupons, but at the option of the county, the bond was payable at any time after July 1st, 1887. The second count was upon a similar bond, for \$1,000, and the third was on a like bond for \$500.00.

38 "On March 3rd, 1891, defendant, Henry County, filed in said cause its answer, said answer as to each of the first and second counts being that on September 6th, 1887, there was due on said bond \$1,010.00 and on that date it deposited that sum in the National Bank of Commerce of New York, for the payment of the bond and interest, and on September 6th, 1887, tendered that sum

to the plaintiff as full payment of the bond and interest thereon, but plaintiff refused to accept same, 'and defendant says it has at all times been ready and willing to pay plaintiff said sum of \$1,010.00 in full payment of said bond, and unpaid interest, and now here again tenders to plaintiff said sum of \$1,010.00 in full payment of said bond and unpaid interest due thereon on September 6th, 1887, and now brings the said sum into court.' The answer to the third count was exactly the same except that the amount named was \$505.00 instead of \$1,010.00.

"Upon March 3rd, 1891, there was entered on the records of said court the following:

"('This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of \$2,525.00 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein.'

"On June 27, 1891, the plaintiff in said suit filed his reply, which was a general denial.

"On July 2, 1894, there was entered on the records of said court the following:

"('This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court and by the court taken under advisement with leave to the parties to file briefs.'

"On February 11, 1895, there was entered on the records of said court the following:

"('A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 201 *was* duly tendered by defendant at the place of payment on the first day of September, 1887, and that after the plaintiff instituted this action in this court and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff, and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of \$1,010.00.'

"(The findings as to the second and third counts are precisely similar except as to the amounts, the second count being \$1,010.00 and the third \$505.00.)

"It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars (\$2,525.00), the aggregate amount found to be owing to him under the three counts of the petition and that plaintiff pay the costs of this action, and that execution issue therefor.

39 "And it further appearing to the court that the said sum of \$2,525.00 so paid into court as aforesaid, was paid and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk or otherwise, it is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid.' No appeal was taken from this judgment, and the same has become final and remains in full force and effect and unpaid.

"4. On March 3rd, 1891, Henry County did hand to Warren Watson the sum of \$2,525.00 as in said entry of that date recited.

"No order or direction of the court as to this money was ever made, had or obtained and no entry in reference to the same was ever made, except as set out in paragraph 3.

"When the \$2,525.00 was so paid to said Warren Watson, he, on the same day, deposited the same in a bank to his own credit, and at no time did he treat the money as in the depository of the court. He never at any time presented any account to the court of such money, and has never paid it to Henry County, or David Stewart and never during the pendency of the suit of Stewart *vs.* Henry County did either party take any steps toward having any order made in relation to the said money, other than was actually made, nor make any objection to the method in which said money was received.

"David D. Stewart had no knowledge of said acts of Warren Watson.

"5. At no time was demand made on these defendants or Warren Watson for said money other than is to be inferred from the institution of the suit.

"6. A jury is waived, and the answer of defendants shall be regarded as verified.

"The above and foregoing are all the facts in the case and are to be taken subject to objections by either party as to their relevancy and competency."

On consideration of the agreed statement of facts, the circuit court found the issues for the relator, and rendered a judgment against the defendants for the amount claimed. The opinion of the learned trial judge is reported in 93 Fed. Rep., 719. The defendants sued out this writ of error.

CALDWELL, circuit judge, delivered the opinion of the court:

The first contention of the plaintiff in error is that the bond required to be given by a clerk of the United States circuit court is intended "solely for the protection of the United States and not at all for the protection of private suitors."

From the organization of the judicial system of the United States

the condition of the clerk's bond has been the same. The judiciary act of 1789 required the clerk to "give bond with sufficient sureties to the United States in the sum of \$2,000 faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court of which he is clerk." As the business in these courts increased, provision was made by which the penalty of the bond could be correspondingly increased. By section 795 of the Revised Statutes of the United States, the penalty of the bond was "to be fixed by the court," and by the later act of February 22, 1875, 18 U. S. Stat., ch. 95, sec. 1, p. 333, the penalty of the bond is fixed at "not less than \$5,000 and not more than \$20,000, to be determined and regulated by the Attorney General of the United States." Very curiously, section 795 of the Revised Statutes omitted to name any obligee in the bond; this omission, however, in no manner affected the validity of the bond, for with or without a named obligee the bond was a valid security to any one injured by a breach of its conditions. *Carnegie, Phipps & Co. (Limited) v. Hulbert*, 36 U. S. App., 81. This omission was remedied by the act of 1875, which requires the bond to be given "to the United States," as did the judiciary act of 1789, but the condition of the bond has remained the same under all the acts. If the contention of the plaintiff in error is sound, that the bond is intended "solely for the protection of the United States and not at all for the protection of private suitors," then no act on the part of the clerk in the discharge of his official duties which results in loss or injury to a private suitor in the court, would render him liable therefor in his official capacity. He might with impunity refuse "to record the decrees, judgments and determinations of the court" in favor of private suitors without incurring official responsibility on himself, or imposing liability on his sureties for such neglect of duty. If the statute was made to express the construction contended for, the condition would read "faithfully to discharge the duties of his office so far forth as they concern the United States only, and seasonably to record the decrees, judgments and determinations of the court in cases in which the United States only is interested." Obviously, the court cannot engraft any such limitations on the conditions of the bond. The United States is named as the obligee in the clerk's bond as is done in the case of the marshal's bond and the bonds of other officers of the United States, but the bond is given for the indemnity of any one—the United States no more than any private suitor—who suffers loss through his official misconduct or delinquency—any one suffering loss by the breach of the covenant of his bond "faithfully to discharge the duties of his office." This comprehensive condition embraces every duty and obligation imposed on him by law or the lawful order, usage and practice of the court. *Grady v. United States*, 98 Fed. Rep., 238. Section 985 of the Revised Statutes of the United States provides:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States,



in the name and to the credit of such court: Provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court." When a clerk receives money in his official capacity he does not "faithfully discharge his duty" in respect to such money unless he "forthwith" deposits it in conformity with the requirements of this section.

And much less does he comply with the obligation of the  
41 bond when he not only fails to deposit it as required by law, but fails to produce and pay it over to the party entitled to it under the order of the court. The section quoted has been the law since 1817 (act March 3, 1817, 3rd Statutes, 39) save in the name of the depositories. The statutes of the United States plainly contemplate that the clerk will receive in his official capacity moneys belonging to private suitors. Provision is made for loaning out moneys in the registry of the court "according to the agreement of the parties," and the parties here meant are private suitors, as the Government does not loan her money in this way. The moneys belonging to the United States arising under the internal-revenue laws of the United States which come into the hands of the clerk, are required to be paid to the collector of internal revenue for the district (section 3216 Revised Statutes; Instructions of Attorney General 133) and all other moneys coming into the hands of the clerk belonging to the United States are required to be "promptly covered into the treasury," *ib.* Section 798, Revised Statutes, provides:

"At each regular session of any court of the United States, the clerk shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they are deposited, and in what causes payments have been made; and said account and the vouchers thereof shall be filed in the court." This section is a re-enactment of a similar section of the act of 1817. It is apparent from the provisions of this section that Congress was cognizant of the fact that clerks were constantly receiving and disbursing in their official capacity moneys in causes pending in court between private suitors. This is still more plainly shown by the provisions of the act of February 19, 1897, 29 Stat., ch. 265, sec. 3, page 578, which requires moneys which have remained in the registry of the court unclaimed for ten years or longer, to be deposited to the credit of the United States; and a similar provision is found in sec. 4545 Revised Statutes of the United States.

It is obvious that the moneys here referred to are not the moneys of the United States. Moneys paid to the clerk in his individual capacity become a mere private trust and are no more subject to congressional control, or the control of the court, than if he were not clerk. For more than a century the clerks of the circuit courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and customary manner, and during that time neither the clerks nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such. Under the provision of section 828, the clerk is

allowed "for receiving, keeping and paying out money in pursuance of any statute or the order of the court, one per centum on the amount so received, kept and paid;" and this poundage has always been allowed to them on moneys received and paid out by them. Nothing short of legislation can change the law as established by more than a hundred years of uniform and constant practice of the courts. The money sued for in this action was paid into court and received by the clerk in a "cause pending in said court," and it was the duty of the clerk to "forthwith" deposit the same as required by section 995. His failure to do so was a breach of the condition of his bond, for which the sureties are liable to the person suffering damage thereby.

42 A further contention of the plaintiff in error is that the money was not received by the clerk by virtue of his office.

The answer set up a tender, before suit was brought, of the amount due on the bonds and concluded in these words, "and now brings the said sum into court." The answer was filed with the clerk, and the money tendered therein deposited with the clerk, at the time the answer was filed. The defendant had an undoubted right to set up this defense, and to set it up in a manner to make it effectual. A plea of tender, not accompanied with the money tendered, is bad; and a tender of the money without a plea setting it up, goes for nothing. To make its plea good, it was necessary, therefore, for the defendant to file its written answer setting up the tender and to bring the money tendered into court, as was done. The defendant did not have to apply to the court for leave to bring the money into court any more than it had to apply to the court for leave to file its answer. The answer and the money were parts of one whole, together they constituted a good plea of tender, which was the county's defense to the action. Neither was a defense without the other. The law gave the defendant the absolute right to do precisely what was done. If it was the duty of the clerk, acting in his official capacity, to file the written part of the answer, it was equally his official duty to receive and safely keep the money tendered with the answer, and which was an essential part of it. When a tender is pleaded no previous leave of the court is necessary before bringing the money tendered into court. This has been the law from the earliest times. In 6 Bacon's Abridgment, title, "Tender and bringing money into court," \*p. 444, it is said: "Wherever a tender of money — pleaded, and the debt is not discharged by the tender and a refusal, money may be brought into court without leave of the court; nay, the money tendered must, as hereafter will be shown, in such case be brought into court." 2 Roll. Ab., 524; 12 Mod., 354; Ld. Raym., 83, 254, 643; 1 Barn., 181.

It is clear, then, that the money was rightly paid into court and that it was the duty of some officer of the court to receive and safely keep the same. Who was that officer? It certainly was not the judge, and it is equally clear that it was not the marshal. Under the law and practice of all the courts, State and Federal, it was the official duty of the clerk to receive and safely keep this money. The proposition is *is* too plain to require any argument or authority, but

we quote from a few cases on the subject. In *McDonald v. Atkins*, 13 Neb., 568, suit was instituted on the bond of the clerk for money paid to him by the sheriff collected on an execution issued in favor of the plaintiff, and which he had failed to account for. The court said:

"The point made by the defendant's counsel is, that the money was not received by Vedder in his official capacity—in other words, that he had no authority as clerk to receive it. And so the court below held.

"No one can doubt, we think, that this ruling was in direct conflict with the general understanding of the legal profession of this State as to the duty of court clerks in the receipt and disbursement of money paid upon judgments, from the first organization of our judicial system, through all its changes, down to the present time. Indeed, we doubt exceedingly that any one, especially a practicing lawyer, has ever supposed that upon the rendition of a money  
43 judgment, the defendant could not prevent a further accumulation of costs and interest, and have a satisfaction legally entered of record, by at once paying to the clerk of the court the amount which it calls for. If he could not—if clerks are really without authority to receive money on judgments in their custody, then to whom, in the absence of the plaintiff and his attorney, could payment be legally made?

"While it is true that we have no statute which in express terms declares that the clerks of the several courts shall accept payment of judgments in their custody, it is very evident that the legislature contemplated and intended that they should do so.

"And even in the absence of such provision, can it be doubted that a party against whom a money judgment is sought by action may, upon being summoned, pay the amount demanded 'into court,' and thereby prevent the making of any further costs? But how is it to be effected? In the case of inferior courts—those not of record, and unprovided with clerks—the payment can, of course, only be made to the judge or magistrate in person; but in courts of record, where all the steps taken in the progress of the case, from the commencement to the satisfaction of final judgment, are recorded and preserved, and where a clerk for the performance of this duty is specially provided, it is otherwise. In these courts payments of money are never made to the judge, but the uniform practice in this State has always been to make them to his clerk, to whose custody and care the files, records, and whatsoever else relates to cases in courts, are confided. And this practice, so universal, although not positively directed by any act of the legislature, conflicts with none, and, as we have shown, is recognized by and in perfect harmony with several."

In *State ex rel. McNeil v. Morrison*, 63 North Carolina, 508, the clerk of the court was appointed as special commissioner to sell a slave. The clerk after making the sale and collecting the money, failed to pay it over, and suit was instituted on his bond as clerk, and the plea was set up that he received the money as commissioner and not in his official capacity as clerk; but the court said: "The

statute authorizes the court to appoint the clerk or some other fit person to make sales, etc. When the person who is clerk is appointed it is to be taken that he is appointed in his official capacity. Especially is this so when in the order appointing him he is designated as clerk. The clerk then and his sureties are liable upon his official bond." To the same effect is *State on the Relation, etc., v. Blair*, 76 N. Car., 78. In *B. & O. Railroad Co. v. Gaultier*, 165 Ill., 233, it was contended that: "The interlocutory decree did not designate the clerk as depositary, nor order him to receive the money, and the argument is that he was, therefore, a mere depositary of the parties." But the court said: "That decree provided for the payment of the money into court and it was paid by complainant and received by the clerk as a fund of the court under that decree," and the clerk was held liable for the money in his official character as clerk. In *re Finks* (41 Fed., 383), the court in answer to a contention similar to that made in this case, said: "The payment of money into the registry of the court through the clerk as the servant and agent of the court, where there is a fund under the control of the court, and where there is no hand designated to receive it, has been in existence from the foundation of the courts, and is too firmly fixed to be successfully assailed as not being authorized by any act of Congress, or rule of court prescribed in pursuance of an act of Congress." In *Connole v. The People*, 46 Ill. App., 72, the court said: "By the act relating to tender, it is expressly provided that costs tendered may be brought into court, and, of course, in such cases the clerk would receive the same." See *Walters-Cates v. Wilkinson*, 92 Ia., 129; *Billings v. Teals*, 40 Ia., 607. In *State v. Watson*, 38 Ark., 96, 101, the court said: "It often happens in the progress of suits that money is brought into court and placed in the custody of the clerk until disposed of by order of the court, and it would be unsafe to hold that the clerk and sureties are not responsible on his official bond for such moneys."

The contention that the relator has no right to maintain this action in the name of the United States upon his relation is without merit. Under the reformed procedure, which prescribes that the real party in interest must be plaintiff, it has been held that a suit on a bond given for the security of the public generally, and in which the State or other public corporation is the obligee, may be brought in the name of the person beneficially interested in the particular suit. *Morgan v. Long*, 29 Ia., 434; *Strunk v. Ochiltree*, 11 Ia., 158; *State v. Fredericks*, 8 Ia., 553; *Binninger v. Dickinson*, 20 Ia., 260; *Latham v. Brown*, 16 Ia., 118. Whether this is the rule under the Missouri code we need not stop to inquire. In *Murfree on Official Bonds*, section 323, it is said:

"It is usually provided in statutes authorizing official bonds to be required of State, county or municipal officers, that suits may be brought upon them in the name of the official obligee, 'upon the relation' or 'to the use' of the party injured by the breach of the bond or interested in its enforcement. Whenever, however, this express provision is omitted by the statute itself, the deficiency is

supplied by the construction given to such statute by the courts whenever a proper case for such a ruling is presented."

On this question we fully concur with the views of Judge Adams, who tried the case at the circuit, he said:

"It is held in the case of *Washington ex rel. McCue v. Young*, 10 Wheat., 406, that no person can be authorized to use the name of another without his assent, given in fact or by legal intendment. It is my opinion that, in imposing upon clerks of the circuit court the duties above alluded to, which so necessarily and vitally affect the interest of suitors in its courts, and in requiring from such clerk a bond for the faithful discharge of such duties,—the United States, by necessary legal intendment, thereby consents to the use of its name by suitors wronged by official misconduct of the clerk, in a suit against the clerk or his sureties on his official bond. This implied authority or necessary legal intendment becomes the more apparent when it is considered that the clerk's office is an agency of the United States Government, ordained and established for the use and convenience of its people. The money entrusted to its clerk, is, in a large sense, money which the Government has undertaken to keep for its people. When, therefore, the clerk, by official

misconduct, embezzles or misappropriates such money, even  
45 though perhaps the Government may not be subjected to a suit for its recovery, it clearly owes a highly moral and meritorious obligation to the loser, in the nature of a responsibility for the act of misconduct of its agent, and one which the National Congress might regard as sufficient to move it to a private act for his relief." 93 Fed. Rep., 719.

Moreover, if there was a technical error in stating the name of the plaintiff, this court would not reverse the case for that reason, but would direct the substitution of the name of the proper plaintiff. *McDonald v. Nebraska* (at present term) and cases cited.

The judgment of the circuit court is affirmed.

Filed April 9, 1900.

46 And on the ninth day of April, A. D. 1900, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, *April 9, 1900.*

FREDERICK HOWARD, JAMES L. LOMBARD, and JOHN C. Gage, Plaintiffs in Error,	} No. 1288.
<i>vs.</i>	
THE UNITED STATES to the Use of DAVID D. STEWART, and Witten McDonald.	

In error to the circuit court of the United States for the western district of Missouri.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Missouri and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that David D. Stewart and Witten McDonald have and recover against Frederick Howard, James L. Lombard, and John C. Gage the sum of twenty dollars for their costs herein and have execution therefor.

*April 9, 1900.*

And on the ninth day of July, A. D. 1900, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following :

In the United States Circuit Court of Appeals, Eighth Circuit.

47	FREDERICK HOWARD, JAMES L. LOMBARD, and JOHN C. Gage, Plaintiffs in Error,	}
	<i>vs.</i>	
	THE UNITED STATES to the Use of DAVID D. STEWART, and Witten McDonald, Defendants in Error.	

*Assignment of Errors.*

Now come Frederick Howard, James L. Lombard, and John C. Gage and make the following assignments of error :

The circuit court of appeals for the eighth judicial circuit erred in each of the following respects :

1. In affirming the judgment of the circuit court herein.
2. In holding that upon the finding of facts judgment should be rendered against them.
3. In holding that the suit could be maintained in the name of the United States to the use of Stewart.
4. In holding that the sureties on the bond of the clerk of the circuit court were liable for the moneys of a private party deposited under the circumstances set out in the finding of facts.

FRANK HAGERMAN,

*Attorney for Plaintiffs in Error.*

Endorsed: No. 1288. In the United States circuit court of appeals, eighth circuit. Frederick Howard, James L. Lombard, and John C. Gage, plaintiffs in error, *vs.* The United States to the use of David D. Stewart, and Witten McDonald, defendants in error. Assignment of errors. Filed Jul-9, 1900. John D. Jordan, clerk. Frank Hagerman, attorney-at-law, Kansas City, Missouri.

And on the ninth day of July, A. D. 1900, a petition for writ of error, with declination of Witten McDonald to join therein, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

48 In the Supreme Court of the United States.

FREDERICK HOWARD, JAMES L. LOMBARD, and JOHN C. GAGE,	}
Petitioners,	
<i>vs.</i>	
THE UNITED STATES to the Use of DAVID D. STEWART, Respondent.	}

*Petition for Writ of Error.*

Now come Frederick Howard, James L. Lombard, and John C. Gage and respectfully show that heretofore, on the 26th day of April, 1899, a judgment was rendered against them for \$3,057.77 in a suit at law pending in the circuit court of the United States for the western division of the western district of Missouri, wherein The United States to the use of David D. Stewart was plaintiff and petitioners and Witten McDonald were defendants. Said judgment was rendered in an action against them as sureties upon an official bond of Warren Watson, as clerk of the circuit court of the United States, for an alleged failure of duty as such clerk. Said suit arose under the laws of the United States. Thereupon petitioners (McDonald declining to join therein) sued out a writ of error to the United States circuit court of appeals for the eighth judicial circuit, wherein such proceedings were had that a judgment of affirmance was rendered on the 9th day of April, A. D. 1900. Such judgment was unwarranted in the law.

Petitioners therefore ask that a writ of error be allowed so as to have a review in the Supreme Court of the United States, presenting herewith a bond in proper form and assignment of errors.

FRANK HAGERMAN,  
*Attorney for Petitioners.*

Allowed June 29, 1900.  
DAVID J. BREWER,  
*Associate Justice Sup. Ct. U. S.*

Witten McDonald declines to join in the foregoing petition for writ of error.

DAN'L B. HOLMES,  
*Attorney for Witten McDonald.*



49      Endorsed : No. 1288. In the Supreme Court of the United States. Frederick Howard, James L. Lombard, and John C. Gage, petitioners, *vs.* The United States to the use of David D. Stewart, respondent. Petition for writ of error. Filed Jul-9, 1900. John D. Jordan, clerk. Frank Hagerman, attorney-at-law, Kansas, City, Missouri.

And on the ninth day of July, A. D. 1900, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in the words and figures following :

UNITED STATES OF AMERICA, *scilicet* :

Know all men by these presents that we, Frederick Howard, James L. Lombard, and John C. Gage, as principals, and Sanford B. Ladd and Edward F. Swinney, as sureties, are held and firmly bound unto the United States to the use of David D. Stewart in the full and just sum of sixty-five hundred dollars (\$6,500.00), to be paid to the said United States to the use of David D. Stewart, his heirs, executors, administrators, or assigns ; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Scaled with our seals and dated this 26th day of June, in the year of our Lord one thousand nine hundred.

Whereas lately, at the December term, 1899, of the United States circuit court of appeals for the eighth judicial circuit, in a suit depending in said court, wherein Frederick Howard, James L. Lombard, and John C. Gage were plaintiffs in error and The United States to the use of David D. Stewart and Witten McDonald were defendants in error, a judgment was rendered affirming a judgment of the circuit court of the United States for the western division of the western district of Missouri rendered against said Frederick Howard, James L. Lombard, and John C. Gage on the 26th day of

50      April, 1899, for the sum of \$3,057.77, and the said Frederick Howard, James L. Lombard, and John C. Gage have obtained a writ of error of the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said United States to the use of David D. Stewart, citing and admonishing it and him to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., sixty days from and after the date of said citation :

Now, the condition of the above obligation is such that if the said Frederick Howard, James L. Lombard, and John C. Gage shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void ; else to remain in full force and virtue.

FREDERICK HOWARD.

JAMES L. LOMBARD. [SEAL.]

JOHN C. GAGE,

By FRANK HAGERMAN, [SEAL.]

*His Attorney.*

SANFORD B. LADD. [SEAL.]

EDWARD F. SWINNEY. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.  
June 29, 1900.

DAVID J. BREWER,  
*Associate Justice Sup. Ct. U. S.*

Endorsed: No. 1288. In the Supreme Court of the United States. Frederick Howard, James L. Lombard, and John C. Gage, petitioners, vs. The United States to the use of David Stewart, respondent. Bond for writ of error. Filed Jul-9, 1900. John D. Jordan, clerk. Frank Hagerman, attorney-at-law, Kansas City, Missouri.

And on the ninth day of July, A. D. 1900, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the clerk's return thereto, is hereto attached and herewith returned.

51 UNITED STATES OF AMERICA, *set* :

The President of the United States of America to the honorable judges of the United States circuit court of appeals for the eighth judicial circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, at the December term, 1899, thereof, between Frederick Howard, James L. Lombard, and John C. Gage, as plaintiffs in error, and The United States to the use of David D. Stewart, and Witten McDonald, as defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the Supreme Court of the United States on or before the 29th day of August, 1900, to the end that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the said court. Issued at office, in the city of Washington, D. C., this 6th day of July, in the year of our Lord one thousand nine hundred.

JAMES H. MCKENNEY,  
*Clerk of the Supreme Court of the United States.*

Allowed this June 29, 1900.

DAVID J. BREWER, *Justice.*

[Endorsed:] No. 1288. Frederick Howard *et al.*, pl'ffs in error,  
 vs. The United States to the use of David D. Stewart *et al.* Writ of  
 error. Filed Jul- 9, 1900. John D. Jordan, clerk.

*Return to Writ.*

United States Circuit Court of Appeals, Eighth Circuit.

In obedience to the command of the within writ, I herewith trans-  
 mit to the Supreme Court of the United States a duly certified tran-  
 script of the record and proceedings in the within-entitled case, with  
 all things concerning the same.

In testimony whereof I hereto sub-  
 scribe my name and affix the seal of  
 Seal United States Circuit said court, at office, in the city of St.  
 Court of Appeals, Eighth said court, at office, in the city of St.  
 Circuit. Louis, Missouri, this eighteenth day of  
 July, A. D. 1900.

JOHN D. JORDAN,

*Clerk of the United States Circuit Court  
 of Appeals for the Eighth Circuit.*

52 And on the ninth day of July, A. D. 1900, a citation was  
 filed in the clerk's office of said circuit court of appeals in  
 said cause, the original of which, with acceptance of service thereon,  
 is hereto attached and herewith returned.

53 UNITED STATES OF AMERICA, *set*:

To the United States to the use of David D. Stewart, Greeting:

You are hereby cited and admonished to be and appear in the  
 Supreme Court of the United States, at the city of Washington, D. C.,  
 sixty days from and after the day this citation bears date, pursuant  
 to a writ of error filed in the clerk's office of the Supreme Court of  
 the United States, wherein Frederick Howard, James L. Lombard,  
 and John C. Gage are petitioners and you are respondent, to show  
 cause, if any there be, why the judgment rendered against the said  
 petitioners, as in said writ of error mentioned, should not be cor-  
 rected, and why speedy justice should not be done the parties in  
 that behalf.

Witness the Honorable David J. Brewer, associate justice of the  
 Supreme Court of the United States, this 29th day of June, in the  
 year of our Lord one thousand nine hundred.

DAVID J. BREWER, *Justice.*

Service hereof accepted July 2nd, 1900, without prejudice to claim  
 that this is not such a case as can be reviewed by the Supreme Court  
 upon writ of error.

L. C. KRAUTHOFF,  
 KARNES, NEW & KRAUTHOFF,  
*Attorneys for the United States to the Use of  
 David D. Stewart, Defendant in Error.*

Issue and service of citation hereby waived.

DAN'L B. HOLMES,  
*Attorney for Witten McDonald.*

[Endorsed :] No. 1288. Frederick Howard *et al.*, pl'ffs in error, *vs.* The United States to the use of David D. Stewart *et al.* Citation. Filed Jul- 9, 1900. John D. Jordan, clerk.

54    United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing 53 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Frederick Howard *et al.*, plaintiffs in error, *vs.* The United States to the use of David D. Stewart, and Witten McDonald, defendants in error, No. 1288, December term, 1899, as fully as the same remain on file and of record in my office.

I do further certify that the original writ of error, with my return thereto, and the original citation, with acceptance of service thereon, are hereto attached and herewith returned, and that a copy of said writ of error is lodged in my office for the use of the defendants in error.

Seal United States Circuit  
Court of Appeals, Eighth  
Circuit.

In testimony whereof I hereunto sub-  
scribe my name and affix the seal of  
said United States circuit court of ap-  
peals, at the city of St. Louis, Missouri,  
this eighteenth day of July, A. D. 1900.

JOHN D. JORDAN,  
*Clerk of the United States Circuit Court of  
Appeals for the Eighth Circuit.*

Endorsed on cover: File No., 17,851. U. S. circuit court of ap-  
peals, 8th circuit. Term No., 121. Frederick Howard, James L.  
Lombard, and John C. Gage, plaintiffs in error, *vs.* The United  
States to the use of David D. Stewart. Filed July 31st, 1900.